SYKT ANGKASA BUMIPUTRA

v.

SABAH LAND DEVELOPMENT BOARD

HIGH COURT BORNEO, KOTA KINABALU
WAN MOHAMED J
[CIVIL SUIT NO. 504 OF 1982]
14 JUNE 1985

CONTRACT: *Agreement to build 200 units of settlers houses - Breach of contract - Specific performance - Alternatively claim for damages - Whether contract void due to frustration.*

The plaintiffs in this case claim against the defendants for specific performance or alternatively for damages for breach of contract on the part of the defendants. The plaintiffs and the defendants entered into a contract in which the plaintiffs were to build 200 units of settlers houses for a total cost of RM2,111,000. The plaintiffs alleged that a breach of contract had resulted in that the defendants had-

(i) failed to allow the plaintiffs to commence and complete the works; and

(ii) failed to give possession of site to the plaintiffs.

The defendants denied that they were guilty of the alleged breaches of contract and stated that possession of site had duly been given to the plaintiffs to enable them to commence and complete the said works.

Held:

[1] There was frustration of contract in the sense that the defendants were unable to determine the site or sites where the 200 units of settlers houses were to be built.

[2] The failure to determine the site or sites where the 200 units of settlers houses were to be built was the fault of the defendants themselves. The defendants had caused the contract to be frustrated.

[3] The defendants have no defence to the alternative claim of the plaintiffs, namely, that the plaintiffs be awarded damages for breach of contract. As the amount of damages suffered by the plaintiffs was RM402,105.50, the Court entered final judgment for the plaintiffs in that sum and also ordered the defendants to pay 8% statutory interest from date of judgment to date of realisation.

For the plaintiffs/applicants - Gerard Math; M/s. Shelley Yap Leong Tseu Chong Chia & Co.
For the defendants/respondents - Alex Decena; M/s. Jayasuria Kah & Co.

JUDGMENT

Wan Mohamed J:

The plaintiffs in this case claim against the defendants for specific performance or alternatively for damages for breach of contract on the part of the defendants. The plaintiffs and the defendants entered into a contract in which the plaintiffs should build 200 units of settlers houses for a total cost of RM2,111,000. The particulars of the breach were given as follows:

(1) Failing to allow plaintiffs to commence and complete the works;

(2) Failing to give possession of site to the plaintiffs.

The defendants in their original Statement of Defence filed on 26 February 1983, deny that they were guilty of the alleged or any breaches of contract and say that possession of site had duly been given to the plaintiffs to enable them to commence and complete the said works. This was evidenced by the fact that sawn timber had been delivered on the site and the claim for payment for the supply of sawn timber amounting to RM1,608,422 was made by the plaintiffs; and the defendants had made interim payment to the plaintiffs in the sum of RM1,206,316.50. The defendants also say that the plaintiffs had not suffered the alleged or any damage or loss at all.

The plaintiffs by way of Summons-in-Chambers made an application to enter final judgment under O. 14 r. 1, on the ground that the defendants have no defence to the action.

On the 5 March 1984, the above application was fixed for hearing before me in chambers. On that day the Counsel for the defendants, Mr. Alex Decena of M/s. Jayasuria Kah & Co., informed the Court that he had filed an application to amend the Statement of Defence and requested me to hear his application. I acceded to his request and allowed the Statement of Defence be amended as prayed and postponed the hearing of the application by the plaintiffs to enter final judgment to a later date.

On 25 June 1984, the application by the plaintiffs to enter final judgment came before me for hearing. The Counsel for plaintiffs referred to the affidavit in support and put in his written submission. He further added the following points:

(1) Defendants' contention that the plaintiffs had no legal entity cannot stand because the contract was signed by a partner on behalf of the plaintiffs' firm;

(2) If the contract was void, the defendants must be made to pay the balance of the price of the goods supplied to them by the plaintiffs.

At the request of the Counsel for defendants I allowed him to put in his written submission within two weeks and that the Counsel for plaintiffs may reply within two weeks from then. The parties were told that they would be informed of the date when decision would be delivered.

27 September 1984, was fixed for decision of the above application. On that day the Counsel for the defendants informed the Court that he has put in another application to amend further the amended Statement of Defence and requested the Court to hear it. I decided not to entertain his request for reason that I had to decide the application of the plaintiffs to enter final judgment as stated in the notice of hearing. It is to be noted that the Counsel for defendants had not put in written submission as allowed by the Court on or before 25 June 1984. The Court had to decide on the affidavits filed by both parties and the written submission put in by the Counsel for the plaintiffs.

I shall first of all deal with the affidavit of the plaintiffs in support of their application to enter final judgment. The affidavit was sworn by Mr. David Chong Ket Sui, a partner of the plaintiffs' firm with whom the defendants appeared to have negotiated and corresponded in respect of the contract work in question. He laid down the following facts.

Pursuant to the contract signed by both parties the plaintiffs delivered timber materials to the site worth RM1,608,422 of which the defendants paid a sum of RM1,206,316.50 and retained a sum of RM402,105.50. The defendants had failed to give possession of the site to the plaintiffs to commence work. After waiting for several months the plaintiffs wrote to the defendants' Regional Manager in Kudat as in his letter dated 17 September 1984, marked

"DCKS1" (attached to his affidavit) explaining to the latter that he had been instructed by the defendants' General Manager to commence work soonest and requested him to allocate the area where the 200 units of settlers houses were to be built.

On 20 September 1984, the plaintiffs received a letter marked "DCKS2" from the defendants' General Manager giving permission to commence or proceed with the contract work. On 2 October 1984, the defendants' Senior Manager for Langkon Settlement Project, Kudat, wrote a letter as in Exhibit marked "DCKS3" to the plaintiffs instructing them (the plaintiffs) not to commence with the work until further notice pending re-consideration of suitable sites.

The defendants in their affidavit opposing the application by the plaintiffs to enter final judgment stated that the contract was never concluded as the site to build the 200 units of settlers houses was never determined. Furthermore it was stated in Clause 41 of the said contract that the plaintiffs should commence the work within 14 days from the Engineer's order in writing to commence and that there was no such order from the Engineer. The defendants also say that under Clause 42 of the said contract they were only obliged to give possession of the site or sites to the plaintiffs upon the Engineer's written order to commence.

The Counsel for the plaintiffs in his written submission explains the cause of action and the defence put up by the defendants and submits:

(1) The defendants by their implied action had allowed the plaintiffs to proceed with the work as shown in the following instances and is estopped from pleading as such:

   (a) The payment by the defendants of RM1,206,316.50 to the plaintiffs for the supply of materials for the contract work. Copy of Interim Payment Form attached to the written submission;

   (b) The defendants' Pengurus Besar's letter dated 20 September 1981, marked "DCKS2" to the plaintiffs instructing the plaintiffs to proceed with the work immediately.

   It is the fault and mistake on the part of the defendants that the Engineer's written order was not issued and the plaintiffs should not be punished for that.

(2) The parties had entered into a legal contract. The actual site was determined as stated in its caption. Failure on the part of the defendants to allocate the work site does not make the contract void or voidable. The fact that the work site was not allocated to the plaintiffs by the defendants is in itself a breach of the contract. The contract entered into was a result of tender issued by the defendants. The conditions, particulars and details provided by the defendants in their tender notice were examined by plaintiffs before the tender was put in. It was not provided that availability of the site was a condition to the validity of the contract.

Having perused through the pleading, the affidavits of both sides, the written submissions of Counsel for the plaintiffs and all the documents relevant thereto, I find that the defendants have no defence to the alternative claim of the plaintiffs, viz; that the plaintiffs be awarded damages for breach of contract. The amount of damages suffered by the plaintiffs is the sum of RM402,105.50 which was retained by the defendants in respect of the timber material supplied at the site. I therefore enter final judgment for the plaintiffs in the sum of RM402,105.50 and also ordered the defendants to pay 8% statutory interest from date of judgment to date of realisation and costs to be taxed.

I allowed the plaintiffs to enter final judgment in the above terms on the following grounds:

(1) There was frustration of contract in the sense that the defendants were unable to determine the site or sites where the 200 units of settlers houses were to be built;

(2) There was a clear fact that plaintiffs pursuant to the contract entered into supplied and delivered at the site (although not at the very place where the 200 units of settlers houses to be built) timber materials worth RM1,608,422 of which the defendants acknowledged and made interim payment of RM1,206,316.50 and retained a sum of RM402,105.50. This amount of balance is clearly owned by the defendants to the plaintiffs;

(3) Defendants' argument that there was no binding contract cannot hold water. The failure to determine the site or sites where the 200 units of settlers houses to be built is the fault of the defendants themselves. The defendants had caused the contract to be frustrated;

(4) The plaintiffs in this case are entitled to the actual damage in the circumstances of the matter. As there was no other damages sufficiently proved to have been suffered by the plaintiffs other than the amount retained by the defendants, I find that the actual amount of damage suffered by the plaintiffs is the sum of RM402,105.50 as stated in the above order.

Also found at [1987] 1 CLJ 90